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SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

Term, 1968

No. 808

AARON ALEXANDER,
Respondent,

v.

BETHLEHEM STEEL CORPORATION,
Respondent,

v.

INTERNATIONAL TERMINAL
OPERATING CO., INC.,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To The Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Petitioner, International Terminal Operating Co., Inc., respectfully prays that a Writ of Certiorari issue to review the final judgment of the United States Court of Appeals for the Second Circuit entered on the first day of August, 1967, affirming the judgment of the United States District Court for the Western District of New York, and the appeal docketed in the said Court of Appeals as No.

30,486 and the order of the said court denying rehearing entered on October 21, 1968.

Opinion of the Court Below

The opinion of the Court of Appeals for the Second Circuit is set forth *infra* at page 19 and is reported at 382 F. 2d 963. No opinion was rendered in the District Court.

Jurisdiction

The judgment of the Court of Appeals was entered on August 1, 1967. The order denying the petition for rehearing was entered on October 21, 1968. The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 [1].

Questions Presented

1. When an accident is caused solely by the negligence of a longshoreman's co-workers, should a stevedore employer be held liable to a vessel owner for a breach of warranty on the ground that the vessel has been rendered unseaworthy?

2. Is there no distinction between the concepts of unseaworthiness and negligence?

3. Has the Longshoremen's & Harbor Workers' Compensation Act, 33 U. S. C., § 901 *et seq.*, and its exclusivity of liability provision, 33 U. S. C., § 905 been nullified *sub silentio*?

Statement of the Case

This was a trial before the Honorable John O. Henderson Judge of the District Court for the Western District of New York and a jury.

Aaron Alexander was a longshoreman who was injured on August 16, 1964 while working in the S. S. ELBA, a vessel owned by Bethlehem.

Steel "H" beams, 45 feet in length were being laid lengthwise in the hold of the vessel. Before any steel was lowered into the vessel, dunnage was placed cross-wise across the floor of the vessel in order to provide a proper base upon which to rest the steel beams as they were loaded. After a tier of steel was loaded, dunnage would again be laid cross-wise on top of the steel so that the next tier of cargo could be accommodated.

Steel beams were picked up from railroad gondola cars on the dock by a ship's crane operated by a member of the ship's crew. The actual rigging consisted of a hook at the end of a cable from the crane which was attached to a ring. Attached to the ring and extending downward in an inverted "V" were married falls extending to either end of a 30 foot spreader bar. Extending down from the spreader bar were chains at each end. These would be wrapped around five to seven steel beams and back up to the chain to be secured by a pelican hook against the other end of the chain. The purpose of the spreader bar was to keep the chains equally distant at all times. The proof on the trial indicated that the vessel was being loaded in accordance with the usual, customary and safe method.

The loading operation involved in the case was almost at an end when the accident occurred, thus several tiers of steel had already been loaded into the ELBA.

It developed on the trial that in accordance with customary, proper and safe practice, dunnage was laid crosswise upon steel which had previously been tiered in the hold, so that the hold would be prepared to receive incoming

cargo. Proper regard for the safety of the longshoremen dictated that dunnage be laid down before any cargo was loaded into the hold. In this manner the cargo hold is prepared for the receipt of further dunnage without having incoming loads hanging over the heads of the workmen. There was a small gap or space in the previously laid cargo, across which dunnage had been placed when the hold was prepared for the loading of steel. It was customary that when either a small or a proper sized load came in, the longshoreman leader or signalman had discretion to either lay the load on top of dunnage which had already been laid or to fill such a hole or gap. This latter would be accomplished by pulling back the dunnage which bridged the space or gap and then by lowering the steel into the space or gap, thereafter pushing the dunnage back over the space or gap.

Edward Mallory the signalman and leader of the gang in the number 3 hatch, decided to fill such a gap. Accordingly, he directed Alexander and one Elwood Huff to pull back the dunnage which bridged the gap. Alexander pulled back the dunnage on the south end of the gap and Huff pulled back the dunnage on the north end of the gap, apparently overlooking one or more pieces which overhung the gap and which were ultimately struck by a lift of steel being lowered into the gap. Mallory gave a proper "squat" signal which was an order to lower a short distance slowly. At this point, the load was lowered but it struck a piece of overhanging dunnage which Huff had neglected to pull back and a piece of dunnage flew up striking Alexander. There were no defects in the vessel or its appliances, gear, or equipment, the crane was operating properly at all times and the dunnage was in good condition.

The longshoremen did not misuse seaworthy equipment, putting it to an unintended use, nor was any equipment used which was unsuitable for the use to which it was put.

The jury found in answers to written interrogatories that the vessel was unseaworthy and that Alexander was entitled to a verdict of $26,500.00. The jury also found that Bethlehem was entitled to recover over against International Terminal Operating Co., Inc.

Reasons for Granting the Petition for Certiorari

This petition seeks a resolution by this Court of an issue which has divided the various Circuit Courts of Appeals. The issue presented is whether an incident arising during the progress of work renders a vessel unseaworthy or whether the incident is negligence arising during "a continuous course of operation". The United States Court of Appeals for the Second Circuit has determined in this case that negligence alone creates unseaworthiness from the very moment of the creation of the act.

The Fifth Circuit has taken the position that "* * * We hold that the operational negligence of the employee of an independent contractor, occurring at the moment of injury to a co-worker, does not render the vessel unseaworthy." Antoine v. Lake Charles Stevedores, Inc., 376 F. 2d 443, 447 (5th Cir. 1967), cert. den. 389 U. S. 842.

The United States Court of Appeals for the Ninth Circuit has ruled that:

> "Liability on the ground of unseaworthiness does not attach if the injury was sustained by the negligent use of a seaworthy appliance at the very moment of injury. It does attach if the negligent act has terminated and an appliance has been left in an unsafe condition."

Beeler v. Alaska Aggregate Corp., 336 F. 2d 108, 109, 110 (9th Cir. 1964). See also Blassingill v. Waterman Steamship Corporation, 336 F. 2d 367 (9th Cir. 1964), Huff v. Matson Navigation Company, 338 F. 2d 205 (9th Cir. 1964).

The Court of Appeals for the Second Circuit, on the day that it handed down its decision in the instant case, also decided the case of Candiano v. Moore-McCormack Lines, Inc., 382 F. 2d 961 (2nd Cir. 1967). The opinion, per Moore, C. J., held that in that case a stevedore's negligent handling of seaworthy equipment would render a vessel unseaworthy, casting the vessel owner in liability for damages. Judge Moore speaking for the panel felt that the case of Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705, 18 L. Ed. 2d 743 (1967) bound the Court to such a decision.

Nevertheless, Judge Moore challenged the logic of the decision:

> "Although there is no basis in logic for attributing unseaworthiness to a vessel which is in every respect soundly constructed and complete' · equipped merely because of the negligence of longshoremen or crew members engaged in an operation on board, the term has been created by judicial fiat and used for all practical purposes for imposing absolute liability on shipowner and stevedore."

382 F. 2d 961, 962 (2nd Cir. 1967).

When the Candiano case came back before the Second Circuit the Petition for Rehearing was denied. Judge Moore in a concurring opinion further commented as follows:

> "In my opinion, the whole process of straining to impose liability has become completely unrealistic. As a basis for decision the term 'unseaworthy' is utterly meaningless, as Noah Webster defined the word. From

> the time notice to the shipowner of a defect with a reasonable opportunity to remedy it was written out of the law, the instances, to which the word unseaworthy has been applied, to my mind have advanced (or retrogressed) from the absurd to the ridiculous. * * *"

386 F. 2d 444, 448 (2nd Cir. 1967).

Throughout his concurring opinion, Judge Moore pointed out that while other circuits lacked consistency, the panels had been "hopelessly divided" in the Second Circuit, 386 F. 2d 444, 445; he stated that "to add to the confusion, the Fifth Circuit on April 13, 1967 had decided *Antoine v. Lake Charles Stevedores, Inc.*, 376 F. 2d 443 * * *". Certiorari was denied in that case, *sub nom. Louis Antoine v. Lykes Brothers Steamship Co., Inc.* on October 9, 1967 in 389 U. S. 869, 19 L. Ed. 2d 146 (1967). It would seem that since *Antoine* was decided after the May 22, 1967 decision in *Mascuilli* that this Court had not intended to nullify the doctrine of "operational negligence". In his concurring opinion in the denial for the petition for rehearing in *Candiano,* Judge Moore sets forth a number of problems which have now been raised which will plague Judges at the trial level. 386 F. 2d 444, 448 (2nd Cir. 1967).

This Court has not spoken in this area; the various circuit courts acknowledge that they are groping in an area of deep and abiding uncertainty; and the circuits, not to mention litigants are in great need of guidance and assistance from this Court.

Argument

The *Alexander* case, presents a unique situation for consideration by this Court. *Alexander* brought his action to recover damages for personal injuries which he sustained due, as he alleged, to negligence and unseaworthiness on the part of the Bethlehem Steel Corporation as owners of the S. S. ELBA. The jury in response to written interroga-

tories found that there was no negligence on the part of Bethlehem and ruled that the vessel was unseaworthy and that Bethlehem might have indemnity from I. T. O. because, under the Court's charge, the longshoremen had been guilty of negligence in their operations which rendered the vessel unseaworthy.

There was no argument or contention made that the vessel was in any way deficient in appliances or equipment. Nor was there any claim that any of the equipment was put to an unintended use.

The case therefore presents issues solely relating to the performance of work by the longshoremen. The case differs from *Candiano* because in *Candiano* the Court could find that an improper rigging procedure had been adopted from the initiation of the work, since a beam which was being lowered had not been properly hooked-up to the lowering mechanism.

In *Alexander* dunnage which had been properly placed on the cargo had to be removed if cargo was to be placed under it. It was during this simultaneous process of removal of the dunnage and lowering of the steel that the load struck a piece of dunnage which bounced up striking the plaintiff.

In *Grillea v. United States*, 232 F. 2d 919 (2nd Cir. 1956) Judge Learned Hand formulated a distinction which set forth the proposition that a negligently created condition of sufficient duration could constitute unseaworthiness.

The Second Circuit perpetuated Judge Hand's approach in its *en banc* decision in *Puddu v. Royal Netherlands S. S. Co.*, 303 F. 2d 752 (2nd Cir. 1962). This Court denied certiorari in 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962). While this may present difficult fact issues in

many cases, it seems entirely proper to leave the resolution of this question to the trier of fact, whether Judge or jury.

The Second Circuit's reasoning in *Alexander* really amounts to condonation of a legal fiction. The ELBA was not *really* unseaworthy, unless the trier of fact should have found that a sufficient time had elapsed to permit the situation to ripen into one of unseaworthiness.

The distinction seems to be well enunciated in the dissenting opinion of Albert V. Bryan, C. J. in *Venable v. A/S Det Forenede Dampskibsselskab*, 399 F. 2d 347 (4th Cir. 1968) in which he stated at page 354:

> "My understanding is that the rule does not equate negligence with unseaworthiness. The two remain separate elements. One is cause, the other effect and together they create a basis of liability beyond a claim on negligence alone, *i.e.* a cause of action for unseaworthiness. Hence, the negligence of the longshoreman while actionable *qua* negligence is not actionable as unseaworthiness unless it has caused unseaworthiness. Illustrations of the distinctiveness between the two are not wanting. For example, if a longshoreman in walking past another on deck negligently dropped a wrench upon the latter's foot, the injured man would not have a cause of action on unseaworthiness, for no such condition resulted. Other instances come readily to mind. All demonstrate that negligence does not by itself constitute unseaworthiness. This concept of the independence of these two elements was carried by the District Judge into the instructions here, and quite correctly I think.* * *"

A Petition for Rehearing was denied *en banc* with the Court *per curiam*, stating:

> "* * * We adhere to the view that operational negligence may cause unseaworthiness, but do not intimate that every instance of operational negligence necessar-

> ily creates liability under the unseaworthiness doctrine."

399 F. 2d 347, 355 (4th Cir. 1968). From this statement it can certainly be argued that the doctrine of "operational negligence" it viable in the Fourth Circuit.

This Court has stressed the "broad remedial purposes of the doctrine of unseaworthiness", *Waldron v. Moore-McCormack Lines Inc.*, 386 U. S. 724, 87 S. Ct. 1410, 18 L. Ed. 2d 482 (1967) and there is no question but that it is preferable to have the industries which are directly concerned pay for the economic loss sustained by the longshoreman who is subjected to the hazards of this type of work. But far more important than compensating the injured individuals is the prevention of accidents. Alleviation of human suffering is certainly of paramount concern in a properly balanced doctrine which should be enunciated by this Court. The Second Circuit's holding in both *Candiano* and *Alexander* is too rigid to accomplish this result. The territorial area covered by the Second Circuit is one of the most important in the maritime industry. The ships of countless nations ply her ports. It is true that if the stevedore employers are cast in liability because some negligent act of a longshoreman renders a vessel unseaworthy that the employers and the insurance industry will join to raise stevedoring rates to cover the costs of injuries to longshoremen, but it would certainly seem that the most salutary method of effecting concern for the maintenance of a stout and seaworthy ship should be to impose liability where justified upon shipowners. Under the Second Circuit's holding the most prudent tactic from the standpoint of a callous ship master would be to leave a substandard vessel in the hands of the longshoremen and withdraw from the scene.

Allowing the ruling of the Second Circuit in this case to stand renders the Longshoreman's and Harborworker's Compensation Act a dead letter. The verdict in this case stands alone on negligence of the longshoremen in doing their work. The case does not involve misuse of seaworthy equipment such as overloading or straining of a boom or other equipment. It is a case of simple dereliction in the manner of doing the job—failure to remove a piece of dunnage. No ship's equipment was defective prior to the accident; no ship's equipment was defective after the accident.

In a very real and practical sense, it may be said that accidents to longshoremen occur because of mechanical failure or human error or a combination of both. Human error can be subdivided into two parts, negligence of ship's personnel and negligence of longshoremen. For personal injuries sustained as the result of mechanical failure, the implied warranty of seaworthiness will operate to give the longshoreman a recovery. Where a longshoreman is injured by the negligence of ship's personnel an action against the shipowner on the theory of negligence will prevail, but it is actually the creation of a legal fiction to hold that in a third class of cases, where a longshoreman was injured solely by the negligence of his co-workers, a recovery to the injured longshoreman should be permitted against the shipowner on the theory of a breach of warranty of seaworthiness.

It is quite apparent that the new law made here by the Second Circuit would have several far-reaching effects. One such effect would be that a longshoreman, injured for any reason whatsoever while working aboard ship, would be entitled to recover common-law damages. And, if the basis of the shipowner's liability to the injured longshore-

man is solely an act of negligence on the part of the longshoreman, it follows that the shipowner will recover full indemnity from the stevedore employer. Thus, the result in *Alexander* completely emasculates the Longshoreman's and Harbor Worker's Compensation Act, 44 Stat. 1424 (1927), 33 U. S. C. Sections 901-950, by destroying the *quid pro quo* inherent in that and any other compensation plan. In fact, it is difficult to see why the shipowner should even be joined in such an action.

There is inherent in the very notion of workmen's compensation the concept that the employer has an absolute liability in exchange for a limitation of amount. The result, in *Alexander*, has the effect of removing the limited amount of an employer's liability and thus destroys the very heart of the Longshoreman's and Harbor Worker's Compensation Act. For, if a longshoreman can recover unlimited common-law damages from a shipowner for personal injuries caused solely by the negligence of his coworkers as a matter of law, the shipowner will recover the full indemnity for such amount from the employer together with the attorney's fees. The employer thus has an unlimited *common-law liability* to one of its employees for personal injuries sustained by such employee as a result of his own negligence or that of his fellow employees.

Indeed, where a plaintiff couches his complaint in such terms, it is impossible to envisage any defense that the stevedore would have to a shipowner's claim for indemnity. Accordingly, in an effort to save counsel fees, the stevedore would undoubtedly be requested to take over the shipowner's defense in this type of case. The end result will therefore be an action for longshoremen-employee against the stevedore-employer for unlimited common-law damages.

Policy considerations do not dictate that a vessel under these circumstances should be declared unseaworthy as a matter of law. In the circumstances here presented, no additional care on the part of the shipowner could be exacted by the imposition of absolute liability; and in fact, all that is accomplished is that the effect of the Longshoreman's and Harbor Worker's Compensation Act is completely nullified. The doctrine of unseaworthiness thus becomes a mere conduit to permit the plaintiff to directly sue his employer for common-law damages.

In *Skibinski v. Waterman Steamship Corporation*, Friendly, C. J. in his dissent at page 544 pointed out that:

> "* * * (C)ourts should not strain to use the ship, innocent in every realistic sense, merely as a conduit for imposing on the negligent employer a liability to his employees differing from the absolute but limited one which Congress made exclusive by Section 5 of the Longshoreman's and Harbor Worker's Compensation Act, 33 U. S. C. Section 905. Of course the statute did not impair an injured longshoreman's right against third parties who have wronged him, 33 U. S. C. Section 933. But proper respect for what Congress was 'driving at' (See Johnson v. United States, 163 F. 30, 32, 18 L. R. A., N. S., 1194 (1 Cir., 1908), Holmes, J.) ought to lead judges away from a doctrine which so frustrates the legislative purposes by imposing a transitory liability on a third party that has turned over a thoroughly seaworthy vessel to a qualified stevedore. If the benefits under the Compensation Act are adequate, the remedy lies in action by Congress, not in judicial legerdemain which helps one longshoreman but does nothing for another whose situation would appear similar to everyone except those lawyers and judges who have had to accustom themselves to the witty diversities of this branch of the law."

The complex policy considerations covering the adequacy of compensation awards and jury verdicts, and also the

impact of the law upon the American maritime industry have been excellently discussed in the article *Application of the "Unseaworthiness" Doctrine to Longshoremen*, Shields and Byrne, 111 U. of Penn. L. R. 1137 (1963).

It is respectfully submitted that this result, is so destructive of the entire scheme and underlying principles behind the *Longshoreman's and Harbor Worker's Compensation Act* that the change should come only from Congress.

Conclusion

The judgment in favor of respondents should be set aside and the lower court directed to enter judgment in behalf of petitioner herein; or in the alternative a new trial should be granted to the petitioner herein.

Respectfully submitted,

JAECKLE, FLEISCHMANN, KELLY,
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720 Liberty Bank Building,
Buffalo, New York 14202.

J. EDMUND DE CASTRO, JR., ESQ.,
Of Counsel.

Appendix "A"

JUDGMENT ON JURY VERDICT.

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF NEW YORK

AARON ALEXANDER,

vs.

BETHLEHEM STEEL COMPANY,

vs.

INTERNATIONAL TERMINAL OPERATING CO., INC.

Civil Action File No. 11,489.

This action came on for trial before the Court and a jury, Honorable John O. Henderson, United States District Judge, presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

It is Ordered and Adjudged that the plaintiff Aaron Alexander have judgment against the defendant Bethlehem Steel Company in the sum of Twenty-six Thousand Five Hundred Dollars ($26,500.00) with costs to be taxed and that the defendant Bethlehem Steel Company have judgment against the third-party defendant International Terminal Operating Co., Inc. in the sum of Twenty-six Thousand Five Hundred Dollars ($26,500.00) with costs to be taxed.

Dated at Buffalo, New York, this 25th day of February, 1966.

ROLAND E. LOGEL,
Clerk of Court.

Appendix "B"

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the first day of August, one thousand nine hundred and sixty-seven.

Present: Hon. J. Edward Lumbard,
Chief Judge,

Hon. Leonard P. Moore,
Hon. Irving R. Kaufman,
Circuit Judges.

AARON ALEXANDER,
Plaintiff-Appellee,

v

BETHLEHEM STEEL CORPORATION,
Defendant and Third-Party Plaintiff-Appellant,

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellant.

Appeal from the United States District Court for the Western District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Western District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

A. DANIEL FUSARO,
Clerk,

By: VINCENT A. CARLIN,
Chief Deputy Clerk.

Appendix "C"

30486

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

AARON ALEXANDER,
Plaintiff-Appellee,

v.

BETHLEHEM STEEL CORPORATION,
Defendant and Third-Party Plaintiff-Appellant,

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for appellant International Terminal Operating Co., Inc.,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is DENIED.

J. EDWARD LUMBARD,
LEONARD P. MOORE,
IRVING R. KAUFMAN,
Circuit Judges.

Oct 21 1968

Appendix "D"

30486

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

AARON ALEXANDER,
Plaintiff-Appellee,

v.

BETHLEHEM STEEL CORPORATION,
Defendant and Third-Party Plaintiff-Appellant,

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellant.

A petition for a rehearing containing a suggestion that the action be reheard *in banc* having been filed herein by counsel for appellant International Terminal Operating Co., Inc., and no active circuit judge having requested that a vote be taken on said suggestion,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

J. EDWARD LUMBARD,
Chief Judge.

October 21, 1968.

Appendix "E"

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 110—September Term, 1966.

(Argued October 28, 1967 Decided August 1, 1967.)

Docket No. 30486

AARON ALEXANDER,
Plaintiff-Appellee,

v

BETHLEHEM STEEL CORPORATION,
Defendant and Third-Party Plaintiff-Appellant,

v.

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Third-Party Defendant-Appellant.

Before: LUMBARD, *Chief Judge,*
MOORE and KAUFMAN, *Circuit Judges.*

Appeal by the defendant, Bethlehem Steel Corporation, from a judgment of the United States District Court for

the Western District of New York, Honorable John O. Henderson, entered upon a jury verdict in favor of the plaintiff in the sum of $26,500 and by the third-party defendant, International Terminal Operating Co., Inc., from a judgment against it in like amount in favor of Bethlehem Steel Corporation.

Affirmed.

Fenton F. Harrison, Buffalo, New York (Heffernan, Harrison, Sweet & Gruber, on the brief), for appellee-appellant, Bethlehem Steel Corporation.

J. Edmund de Castro, Buffalo, New York (Jaeckle, Fleischmann, Kelly, Swart & Augspurger, on the brief), for third-party defendant-appellant.

Ralph Saft, Buffalo, New York, for plaintiff-appellee.

MOORE, *Circuit Judge.*

This case raises the same issue presented in *Candiano v. Moore-McCormack Lines, Inc.*, ____ F. 2d ____, also decided today, to wit: Can a ship be rendered unseaworthy solely on account of the negligence of a longshoreman during a loading operation? A long line of cases in this Circuit starting with *Grillea v. United States*, 232 F. 2d 919 (2 Cir. 1956), had held that operational negligence alone does not create unseaworthiness, but in *Candiano*, we recognized that the Supreme Court rejected the distinction between operational negligence and unseaworthiness in *Mascuilli v. United States*, 35 L. W. 3411 (U. S. May 22, 1967), and thus an affirmative answer must be given to the question posed above.

Plaintiff, Aaron Alexander, a longshoreman, sued Bethlehem Steel Corporation (Bethlehem), alleging that, while working aboard the S.S. ELBA owned by Bethlehem, he

had suffered injuries as a result of (1) negligence by an employee of Bethlehem in the operation of the crane, and (2) the unseaworthiness of the vessel. Bethlehem in its answer denied negligence and unseaworthiness, claimed contributory negligence and that plaintiff's sole remedy was under compensation law. Bethlehem also filed a third-party complaint against plaintiff's employer, International Terminal Operating Co., Inc. (ITO), alleging breach of warranty of workmanlike stevedoring services and, hence, that ITO was liable to Bethlehem for any judgment in plaintiff's favor. ITO by answer, in addition to a denial, alleged that Bethlehem's conduct precluded recovery against ITO. Upon this alignment, the case was submitted to the jury.

In answer to written interrogatories, the jury found (1) that Bethlehem had not been negligent, (2) that the vessel had been unseaworthy which unseaworthiness contributed in whole or in part to plaintiff's injuries, (3) that plaintiff had not been contributorily negligent, (4) that Bethlehem was therefore liable in the amount of $26,500 for plaintiff's injuries, but that (4) Bethlehem was entitled to recover over against ITO.

Only a sketchy outline of the facts is necessary as a background for the legal issues. On the early morning of August 16, 1964, two gangs of ITO longshoremen were unloading steel beams into the No. 3 hold of the ELBA. Dunnage was placed between each layer of beams. Plaintiff was engaged in the operation. In order to enable a lift of steel to be placed in a narrow gap or hole, removal of any overhanging dunnage was required. Plaintiff and a co-worker undertook to move dunnage so that it would not protrude. The steel was lowered but the crane operator allowed the lift to fall during the last three or four feet.

The beams struck pieces of protruding dunnage, causing them to fly through the air, striking and injuring plaintiff.

Plaintiff's claims of negligence were premised upon the alleged incompetence of, and faulty operation of the lowering mechanism by, the crane operator. His claims of unseaworthiness were based upon unsafe stowage, namely, improper placing of dunnage and incompetence of the crane operator.

The principal issue on appeal concerns the jury's finding that the vessel was unseaworthy. Bethlehem urges that in light of this Circuit's operational negligence cases, there was insufficient evidence on which to base a finding of unseaworthiness, whereas ITO argues that, at any rate, the charge to the jury on the issue was inadequate. The trial judge properly charged that, to support a finding of unseaworthiness, "It is sufficient if a given condition temporarily renders the vessel, its equipment and appurtenances, unseaworthy," but did not give further instructions distinguishing between operational negligence and unseaworthiness as required by our holding in *Grillea*. Although neither counsel for Bethlehem nor ITO requested a charge in the specific language suggested by *Grillea*, requests were made and denied by the court to the effect that Bethlehem would not be liable if the accident were caused solely by the manner in which plaintiff and his co-workers were carrying out their work or by the misplacing of the dunnage by the longshoremen in the course of their loading operations. We believe these requests were sufficient to apprise the trial court on the nature of the alleged errors in the charge.

In the light of *Mascuilli*, the trial court's charge on unseaworthiness now appears to have been substantially correct. A charge distinguishing between operational negli-

gence and unseaworthiness would appear to have been error.

ITO's further claim that the jury verdict was excessive is rejected.

Affirmed.

LUMBARD, *Chief Judge* (concurring):

I concur in affirming the judgment, but I do so on the ground that appellants' attorneys failed to make a sufficient objection to the court's charge on unseaworthiness. They requested an instruction, and objected to the court's refusal to charge, "that negligence alone would not render the vessel unseaworthy." This requested instruction, however, was an incorrect statement of the standard of *Grillea v. United States*, 232 F. 2d 919, 922 (2 Cir. 1956), since under that standard a negligently created condition of sufficient duration can constitute unseaworthiness. When appellants' attorneys objected to the court's refusal to give this instruction, moreover, the court told them to attempt to work out an instruction in suitable language. This was not done. Under these circumstances, I do not believe that appellants have satisfied the requirement of Fed. R. Civ. P. 51 that a party objecting to an instruction state "distinctly the matter to which he objects and the grounds of his objection." The charge as a whole was not such fundamental error that we should consider this asserted error absent a sufficient objection. *Cf. Pettus v. Grace Line, Inc.*, 305 F. 2d 151 (2 Cir. 1962).

SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1968

No. 808

INTERNATIONAL TERMINAL OPERATING CO., INC.,
Petitioner,

v.

AARON ALEXANDER,
Respondent,

v.

BETHLEHEM STEEL CORPORATION,
Respondent.

ANSWER TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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To the Honorable, The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Statement of the Case

Respondent Alexander accepts the statement of facts set forth in Pages 2 through 5 of the Petition, with the following exceptions:

The unseaworthiness of the S. S. ELBA was *not instantaneous* or *momentary*. It was caused at some time before the gang of longshoremen with whom Alexander was work-

ing had entered this hold of the ship. The dunnage was left in a dangerous condition, at least prior to the dinner break, because the very first load that was lowered by the crane into this particular hold struck the overhanging dunnage and caused it to strike Alexander, causing serious injuries to him. Who left it in this unsafe position or how long it so remained is uncertain, but that it did remain in this dangerous, improper manner, protruding over an opening between the steel beams already stowed for a *considerable length of time* was undisputed. Not only did the longshoremen working with Alexander so testify, but this was corroborated by the petitioner's own witness and foreman, Richard T. Shanahan, and by Melford J. McDonald, assistant district agent, Bethlehem Steel, Marine Division, in his testimony on behalf of that party.

Furthermore, there was a plethora of evidence of the incompetence of the crane operator Fowler, his inexperience, the fact that he had failed to follow signals earlier that evening in another hold hitting the sides of the ships with loads of steel and causing the longshoremen to run for cover, and dropping loads of steel and causing dunnage to fly ten to twelve feet in the air. Complaints had been made about his incompetency to the petitioner's lead man, but he, the crane operator, was not removed. Consequently, petitioner is incorrect in stating "that the vessel was being loaded in accordance with the usual, customary and safe method."

There was also proof of the inadequacy of the lighting in this hold of the ship, and that the lights were improperly located, causing shadows by the incoming loads of steel which might very well have caused Huff to overlook this protruding or overhanging dunnage and fail to remove it. Huff was working in semi-darkness.

None of the above was instantaneous or momentary.

The Issues and Holdings Below

In the District Court where this action was tried the jury found the S.S. ELBA unseaworthy, that Alexander was not contributorily negligent, and awarded a verdict to him against Bethlehem. The jury also decided that Bethlehem was entitled to recover over against the present petitioner under its *contract of indemnity.* The Court of Appeals affirmed the judgment of the District Court based upon this verdict.

The petitioner raises no new or novel issue of law pertinent to the facts relative to the issue of liability. If there is any need for consideration of instantaneous negligence by this Court, surely this present case is not the one to bring before this Court, because no momentary act causing unseaworthiness is involved.

ARGUMENT

QUESTION I

There is no novel or new question or conflict among decisions that requires consideration by this Court based upon the facts as to unseaworthiness of the ship in question.

Petitioner is attempting to strain the facts to infer that the unseaworthiness of the ship was based upon instantaneous or momentary negligence. On Page 11 petitioner states "It is a case of simple dereliction in the manner of doing the job—failure to remove a piece of dunnage." It is not the failure of Huff to remove the dangerously placed dunnage, but rather the *original placing of this dunnage in an unsafe and dangerous position* that made the ship unseaworthy.

Even if the ship were made unseaworthy momentarily or instantaneously so as to cause Alexander's injuries then, under the decision in Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705, 18 L. Ed. 2d 743 (1967) the judgment in the present case should be affirmed and this petition denied.

However, since the ship was rendered unseaworthy at a time substantially prior to the time Alexander was injured, and not at the "moment of injury", there is considerable precedent for denying this petition for a writ of certiorari.

> "This case also presents the question of whether the defect 'should be considered as an incident in a continuous course of operation' and not as an unfitness of the ship. Grillea v. United States, 232 F. 2d 919, 922 (2nd Cir. 1956). In defining unseaworthiness we are not concerned with the conduct or process by which fitness is changed to unfitness. Our focus is upon the resulting condition of the ship. See Puddu v. Royal Netherlands Steamship Company, 303 F. 2d 752 (2nd Cir.) cert. denied 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962) (Hays, J., concurring).
>
> Here, the longshoremen, by improperly using an open mouth hook, fashioned an apparatus which was patently unsuitable for the job to which it was put. The use of this apparatus took a substantial amount of time, so that the apparatus became a part of the *Madaket's* equipment. See Mitchell v. Trawler Racer, Inc., 362 U. S. 539, 80 S. Ct. 926, 4 L. Ed. 941 (1962).
>
> Recently, in Reid v. Quebec Paper Sales & Transportation Company, 340 F. 2d 34, 35 (2d Cir. 1965) where a portable ladder was left unsecured, we said:
>
> 'Under the circumstances it was necessary for the ladder to be secured in some fashion when it was being used, and unless it was so secured, it was unfit for its intended use. An unsecured and dangling ladder under the conditions existing at the time of the accident posed a serious threat to the safety of those standing below in the hold, regardless of whether the

ship owner knew it was unsecured and *regardless of how quickly this threat materialized.'* See Strika v. Netherlands Ministry of Traffic, *supra;* Grillea v. United States, *supra.*

Massa v. C. A. Venezuelan Navigacon, 332 F. 2nd 779 (2d Cir. 1964); Spinelli v. Isthmian S. S. Co., 326 F. 2d (2d Cir.) cert. denied 377 U. S. 935, 84 S. Ct. 1338, 12 L. Ed. 2d 298 (1964) and Puddu v. Royal Netherlands S. S. Co., 303 F. 2d 752 (2d Cir.) cert. denied 371 U. S. 840, 83 S. Ct. 67, 9 L. Ed. 2d 75 (1962) are all distinguishable since they were thought to involve transitory situations which had not yet ripened into unseaworthiness. Each arose 'as a *momentary step or phrase in the progress of work* on board' and was 'considered as an incident in a continuous course of operation.' Grillea v. United States, *supra,* 232 F. 2d at 922". (Emphasis ours.)

Skibinski v. Waterman Steamship Corporation v. I. T. O., 360 F. 2d 539 (2d Cir. 1966).

"The claim is based upon the theory that, as soon as the wrong hatch cover was placed over the 'pad-eye' the ship became *pro tanto* unseaworthy, and that, when the libellant stepped upon it and it gave way beneath him, he came within the decision of the Supreme Court in Seas Shipping Company v. Sieracki, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099, which extended the doctrine of The Osceola, 189 U. S. 158, 23 S. Ct. 483, 47 L. Ed. 760, 'to *longshoremen,* while loading or discharging a ship'. – – – On the other hand, if the wrong hatch cover had been placed over the 'pad-eye' the day before the libellant stepped on it, this ship would have been unseaworthy; for that was in effect just what we decided in Mollica v. Compania Sud Americana, 2 Cir., 202 F. 2d 25."

Grillea v. United States, 232 F. 2d 919, 922 (2nd Cir. 1956).

"It (liability) does attach if the negligent act has terminated and an appliance has been left in an unsafe condition – – –. There negligence consisted in

> failing to act prior to the accident – – –. There negligence had come to rest before the ladder fell and was thus an antecedent condition causing the ladder to become unseaworthy."
>
> Beeler v. Alaska Aggregate Corporation, 336 F. 2nd 108 (9th Cir. 1964).

As long as an act making the ship unseaworthy was not instantaneous it matters not if a longshoreman is injured because of the failure of stevedores who had stored the cargo at the shipping point and omitted proper wedges and dunnage or, as in our case, a prior crew or gang improperly stowed cargo. Ryan Co. v. Pan-Atlantic Corp., 350 U. S. 124.

Again we reiterate that nowhere in the *evidence is there any testimony that the damage was improper but only that it was laid improperly before Alexander and his gang even entered Number 3 hold. The Trial Court specifically charged that, if the jury finds it was improperly placed, to charge any further would be irrelevant, unnecessary, surplusage, and could only tend to confuse the jury.*

The cases cited by petitioner allegedly evidencing a conflict of decisions in different circuits of the Court of Appeals have no pertinency here. We are not concerned with unseaworthiness "as a momentary step or phase in the progress of work," "instantaneous unseaworthiness," or "negligent use of a seaworthy appliance at the *very moment* of injury." The petitioner is obviously confusing the improper *placing* of dunnage with the failure to *remove* the dunnage. The Trial Court referred to this "improper placing of dunnage" and not to Huff's failure to remove the dunnage at his northerly end of the gap. This had already crystallized into an unsafe and unseaworthy ship long before the resulting injury to Alexander. There appears to be no conflict of decisions among the various

circuits of the Court of Appeals that a ship is unseaworthy if "the negligent act has terminated and an appliance had been left in an unsafe condition" (Page 5 of petition). This is precisely the situation in the present case.

QUESTION II

This Court has repeatedly passed upon the relationship between claims by longshoremen caused by unseaworthiness of a ship and their rights under the Longshoremen's and Harbor Worker's Compensation Act, and this question has been consistently answered requiring no further consideration by this Court.

Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U. S. 124 (1956), held that a shipowner who was forced to pay damages to a longshoreman injured by an unsafe storage of cargo could recover indemnity from the stevedoring employer for whom the longshoreman worked. At that time the Court foursquarely refuted arguments that the exclusivity provision in Sec. 5 of the Longshoremen's Act barred the owner's claim for indemnity from the stevedore. The Court was likewise unimpressed by the contention that the result in RYAN made the economic burden of the longshoreman's recovery fall on the stevedoring employer contrary to the purpose of the act.

Italia Societa v. Oregon Stevedoring Co., 376 U. S. 315 (1964), Crumady v. The Joachim Hendrick Fisser *et al.*, 358 U. S. 423 (1959) and numerous other cases made this conclusion very

> "Unseaworthiness is not excused on the ground that it was caused by the acts of fellow servants. See Mahnich v. Southern S. S. Co., 321 U. S. 96, 64 S. Ct. 455, 88 L. Ed. 561 (1944); *cf.* Crumady v. The J. H.

Fisser, 358 U. S. 423, 427, 79 S. Ct. 445, 3 L. Ed. 2d 413 (1959)."

Skibinski v. Waterman Steamship Corporation v. I. T. O., 360 F. 2d 539 (2nd Cir. 1966);

Mascuilli v. United States, 387 U. S. 237, 87 S. Ct. 1705, 18 L. Ed. 2d 743 (1967);

Rogers v. United States, 347 U. S. 984 (1954);

Waldron v. Moore-McCormack Lines Inc., 386 U. S. 724, 87 S. Ct. 1410, 18 L. Ed. 2d 482 (1967).

The petitioner apparently overlooks the fact that the third-party judgment of Bethlehem Steel against this petitioner (Page 12 of petition) was not based upon operation of law, but rather upon the contract of indemnity. It is fundamental that one has a right to make claim against anyone not his employer causing one's injuries through negligence, unseaworthiness of a ship, etc. Alexander brought such a claim against Bethlehem Steel and the trial jury found in his favor upon the facts. This same jury decided that Bethlehem Steel was entitled to indemnification under the terms of the contract between that Company and petitioner. This contract was pleaded, proved and interpreted by the trial judge and jury. The judgment against petitioner resulted from this written contract of indemnity. If by this written contract petitioner gave up any protection that it had under any compensation law, it can hardly be heard to complain of the effects of this written contract *which was of its own doing.*

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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